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April 23, 2001

VIA HAND DELIVERY

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Ms. Magalie Roman Salas
Secretary

APR 23 2001

Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte Communication in ET Docket No. 98-206; RM-9147; RM-9245; Applications of Broadwave USA et al., PDC Broadband Corporation, and Satellite Receivers, Ltd., to provide a fixed service in the 12.2-12.7 GHz Band; Requests of Broadwave USA et al. (DA 99-494), PDC Broadband Corporation (DA 00-1841), and Satellite Receivers, Ltd. (DA 00-2134) for Waiver of Part 101 Rules.

Dear Ms. Salas,

The MITRE Corporation has submitted a report to the Commission containing the results of MITRE's independent technical demonstration of terrestrial service technology proposed by Northpoint Technology, Ltd. ("Northpoint") for use in the 12.2-12.7 GHz band. The independent technical demonstration was made pursuant to section 1012 of H.R. 5548 (enacted on December 21, 2000, as part of Pub. L. 106-553), which also requires that the demonstration be subject to public notice and comment for not more than 30 days. I write on behalf of Northpoint to urge the Commission to release the MITRE report for public notice and comment without further ado. Congress specified that the required independent technical demonstration of the technology of those entities which had already submitted applications to the Commission was to be completed within 60 days of enactment—i.e., by February 20. Congress's deadline for action is already long past, making further delay all the more unjustified.

Northpoint understands that PDC Broadband Corporation ("Pegasus") has attempted to delay release of the report by somehow linking the release to a decision by the Commission on whether to accept a license in some allegedly proprietary technology Pegasus claims to possess. As discussed in ex parte submissions filed by Northpoint on April 19 and 20, 2001, Northpoint believes there is no basis for the Commission to take a license in Pegasus's supposed technology. Regardless whether the Commission

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ultimately decides to accept a license from Pegasus, however, there is no reason to delay release of the MITRE report until the Commission reaches a decision on the license issue.

In order to understand why the release of the report should not be linked to the license question, it is useful to review the chronology of Pegasus's actions to date:

- On *January 24*, an organizational meeting for the statutorily mandated testing program was held at MITRE's Tyson's Corner offices. At that meeting, MITRE distributed questions to those parties who had submitted applications to provide terrestrial service in the 12.2-12.7 GHz band, including Pegasus. At that same meeting, the Commission's representatives indicated that communications with MITRE were to be served on participating parties and filed with the Commission on an ex parte basis in ET Docket No. 98-206.
- On *February 1*, Pegasus sent MITRE answers to MITRE's questions. Pegasus marked its answers as "confidential." At that time, Pegasus did *not* serve a copy of its answers on participating parties, nor did it file a copy in ET Docket No. 98-206, nor did it seek to have a protective order entered in these proceedings.
- On *February 12*, Pegasus sent MITRE supplemental answers, also marked "confidential." At that time, Pegasus did *not* file serve a copy of its supplemental answers on participating parties, nor did it file a copy in ET Docket No. 98-206, nor did it seek to have a protective order entered in these proceedings.
- On *March 7*, Pegasus sent MITRE a further supplement, marked "company-proprietary." At that time, Pegasus did *not* serve a copy of this further supplement on participating parties, nor did it file a copy in ET Docket No. 98-206, nor did it seek to have a protective order entered in these proceedings.
- On *March 15*, Pegasus wrote to MITRE that Pegasus agreed "to remove the Company-Confidential and Company-Proprietary designations from that material. MITRE now may use that information for testing and analysis, *and in its report to the FCC*" (emphasis supplied). Pegasus said that it understood the statements in its letter to be "sufficient to eliminate any concerns that MITRE may have had concerning the earlier requests for confidentiality." At that time, Pegasus did *not* serve a copy of its letter on participating parties, nor did it file a copy in ET Docket No 98-206.
- Also on or about *March 15*, Pegasus sent a proposed license agreement to Rebecca Dorch of the Commission's Office of Engineering and Technology. Pegasus did *not* file a copy of the proposed license or a memo describing this ex parte communication in ET Docket No. 98-206.
- On *March 23*, Rebecca Dorch of the Commission's Office of Engineering and Technology sent a letter to participating parties explicitly reaffirming the Commission's directive to serve copies of communications with MITRE on participating parties and to file them on an ex parte basis in ET Docket No. 98-206. Even in response to this explicit directive from the Commission, Pegasus still did not file any of the above communications with the Commission, *despite the fact that it had already informed MITRE not to treat the material as confidential or proprietary.*

- Weeks later, on *April 10*, and only “[a]t the request of the Office of Engineering and Technology,” Pegasus at last filed with the Commission copies of the materials sent to MITRE (but not its communications with the Commission about licensing). At the time of its filing, Pegasus did not seek confidential treatment of its materials, nor did it seek to have a protective order entered in these proceedings.

Northpoint cannot know Pegasus’s theory of how its offer of a license to the Commission is supposed to be linked to the MITRE report, since Pegasus has failed to file any public notification of its *ex parte* communications with the Commission on this topic. It appears, however, that Pegasus is concerned that some of the technical information it submitted to MITRE may appear in MITRE’s report.

From the Timeline of MITRE’s conduct set forth above, three conclusions are apparent.

First, Pegasus can suffer *no conceivable prejudice* from the release of the MITRE report, even if that report does reflect information Pegasus submitted to MITRE, because Pegasus itself has *already* (a) withdrawn the designation of the material as confidential, (b) specifically informed MITRE that the information could be used in its report, which Pegasus knew was subject to public notice and comment, and (c) placed that information, albeit belatedly, in the very public record of these proceedings. Pegasus never conditioned any of these actions on the entry of a protective order, much less on the Commission’s taking a license from Pegasus. Moreover, Pegasus sent copies of its April 10 filing to Northpoint. Even if Pegasus was under the mistaken belief that the Commission would sign its proposed license agreement, it could have had no expectation that Northpoint would take a license or treat the material as confidential in the absence of a protective order. Accordingly, Pegasus has waived whatever confidentiality concerns it may have had with regard to the information in the MITRE report.

Second, Pegasus submitted its information to MITRE *six weeks before* it offered the Commission a license. Having voluntarily submitted the information without a license, Pegasus should not now be heard to say that the Commission’s use of the information is somehow linked to its acceptance of the license.

Third, Pegasus has systematically violated the Commission’s *ex parte* policies in connection with both MITRE’s testing program and its campaign to have the Commission accept a license. Simple fairness requires that Pegasus not be allowed to exploit those prior violations as a basis for delaying release of the MITRE’s report. If Pegasus had made timely *ex parte* filings of its communications with MITRE and the Commission, as it was required to do, then the alleged connection between the license and the MITRE report would have surfaced early enough to have been resolved without delaying the release of the report and the start of the next comment cycle. Furthermore, Pegasus’s failure to comply with the Commission’s *ex parte* rules has handicapped the ability of other parties to react to the delay, since there is no public record of what Pegasus told the Commission about how the license issue and the MITRE report are supposedly linked. The Commission should not permit Pegasus to benefit from its own misconduct by delaying Commission action in the above-referenced proceedings in this way.

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In short, Pegasus should not be allowed to hold the MITRE report hostage with its specious arguments about licensing. The Commission can consider the question whether to accept a license from Pegasus separately, and at its leisure. But the Commission should release the MITRE report for public comment forthwith.

Eighteen copies of this letter are enclosed – two for inclusion in each of the above-referenced files. Please contact me if you have any questions.

Yours sincerely,


Michael K. Kellogg

cc: Ms. Jane Mago, Office of the General Counsel
Ms. Michele Ellison, Office of the General Counsel
Mr. David Senzil, Office of the General Counsel
Mr. Bruce Franca, Office of Engineering and Technology
Ms. Rebecca Dorch, Office of Engineering and Technology
Mr. Mike Marcus, Office of Engineering and Technology
Mr. Peter Tenhula, Office of the Chairman
Mr. Bryan Tramont, Office of Commissioner Furchtgott-Roth
Mr. Mark Schneider, Office of Commissioner Ness
Mr. Adam Krinsky, Office of Commissioner Tristani

CERTIFICATE OF SERVICE

I, Shannon Thrash, hereby certify that on this 23rd day of April, 2001, copies of the foregoing were served by hand delivery* or first class United States mail, postage prepaid, on the following:

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